Ko Ko Ma Pony Horse Centre v Rasa Sayang Beach Hotels (Pg) Bhd

HIGH COURT (PENANG) – SUIT NO 22-100 OF 1988
MOHAMED DZAIDDIN J
5 SEPTEMBER 1988

Civil Procedure – Writ of summons and indorsement – Application to strike out – Application filed before service of statement of claim – Whether application misconceived

Civil Procedure – Writ of summons and indorsement – Application to strike out – Plaintiff's supporting affidavit affirmed a day before writ was filed – Whether fatal to plaintiff's application

Civil Procedure – Interim injunction – Application to set aside – Whether there was suppression of material facts in getting interim injunction – Whether there exists serious question to be tried – Where balance of convenience lay – Merits of case

The plaintiff firm carries on the business of providing horse and pony riding facilities for tourists and local residents. In the affidavit of T, a partner of the plaintiff firm, which was filed in support of the plaintiff's application for an interim injunction against the defendant, the following facts were stated. T, a partner of the plaintiff firm, and the defendant agreed to provide such riding facilities for the guests of the defendant's hotel. In furtherance of this, a draft tenancy agreement was prepared which stipulated that the defendant had agreed to let out a piece of land adjoining the defendant's hotel ('the premises') to the plaintiff for one year to enable it to carry on its business. T was unhappy regarding the period of tenancy and C, the defendant's financial controller, orally represented that the tenancy period of one year was only a formality and that the tenancy would be renewed as a matter of course. Upon these representations, the plaintiff signed the tenancy agreement on 1 July 1987.

Subsequently, the relationship between the plaintiff and the defendant changed when the defendant had a new general manager. The plaintiff was served with a notice to quit and on 15 July 1988, the defendant, through their servants or agents, forcibly broke into the premises and attempted to seal off the said premises.

Upon the above grounds, the plaintiff applied for and was granted an interim injunction restraining the defendant from re-entering the premises. The plaintiff also filed a writ of summons with the indorsement praying, inter alia, for an injunction restraining the defendant from re-entering the premises or interfering with the plaintiff's enjoyment and possession of it until the dispute between them was resolved by an arbitrator under the tenancy agreement. The defendant then filed two applications seeking to set aside the interim injunction and to strike out the writ of summons and indorsement. The defendant relied on an affidavit of K, the defendant's senior financial controller, which denied T's allegations in his supporting affidavit. The defendant contended that (a) the writ and the indorsement disclosed no reasonable cause of action; (b) T's supporting affidavit was affirmed a day before the writ and summons in chambers were filed and this was fatal to the plaintiff's application; (c) there was non-disclosure of material facts by the plaintiff which would have affected the granting of the interim injunction, such as the fact that the re-entry was proper, peaceful and made according to law.

Held, dismissing the defendant's applications:

(1) The defendant's application to strike out the writ of summons and the indorsement was misconceived. This application was made and filed before the plaintiff had filed the statement of claim. As this was an application for a dismissal of the plaintiff's action, it was a salutary rule that the application should not be made before the service of the statement of claim.

(2) The defendant's application was made on all the grounds specified in O 18 r 19(1). Yet there was nothing in the affidavit of K stating his reasons why the action should be struck out on grounds (b), (c) and (d) of r 19(1). As such, prayers 1(b) and (c) should be struck out.

(3) In the court's opinion there was a cause of action which is founded on a tenancy agreement dated 1 July 1987. This was because in T's affidavit there was an allegation of oral representations made by the defendant's servants or agents upon whose assurance the plaintiff acted upon to sign the tenancy agreement and it was the defendant's case that the plaintiff could not rely on the tenancy agreement which had since expired. So long as the pleading disclosed some cause of action or raised some question to be decided by a judge or jury, the mere fact that the case was weak and not likely to succeed was no ground for striking it out.

(4) The fact that T's supporting affidavit was affirmed a day before the writ and the summons in chambers were filed was not fatal to the plaintiff's application. An order could be made on the plaintiff's undertaking to have it resworn and filed.

(5) Upon a proper consideration of the matter, there was no suppression of material facts as alleged by the defendant.

(6) There were no sufficiently cogent grounds for the interim injunction to be set aside. There was a serious question to be tried regarding the tenancy of the premises and the balance of convenience lay in favour of the interim injunction remaining in force. This was because if the plaintiff were successful there would be difficulty getting the horses, ponies and other paraphernalia into the premises again and there would also be difficulty in quantifying the loss suffered by the plaintiff. On the other hand, there was no suggestion that the defendant would require the premises for their immediate use.

[*Editorial Note*: The defendant appealed to the Supreme Court vide Civil Appeal No 376 of 1988. The Supreme Court (comprising Abdul Hamid LP, Abdoolcader and Harun SCJJ) dismissed the appeal with costs on 5 December 1988.]

Cases referred to

1 *Wright* v *Prescot UDC* (1916) 115 LT 772 (folld)
2 *Green* v *Prior* 1886 WN 50 (folld)
3 *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered* v *Poh Swee Siang* [1987] 2 MLJ 611 (refd)
4 *American Cyanamid Co* v *Ethicon Ltd* [1975] AC 396 (folld)

Legislation referred to

Rules of the High Court 1980 O 18 r 19(1)

NG Sivanandan (*Miss Karin Lim Ai Ching* with him) for the defendant/applicant.

Tan Beng Hong for the plaintiff/respondent.

Cur Adv Vult

Mohamed Dzaiddin J: In this application, the defendant applied to this court for two orders, one to strike out the plaintiff's writ of summons with the indorsement and the other to set aside the ex parte injunction granted against them on 19 July 1988. Having dealt with the preliminary

issues, counsel agreed, for convenience, that the application be argued together.

By the plaintiff's writ of summons with the indorsement dated 19 July 1988 (later amended under O 20 r 1 on 9 August 1988), the plaintiff prayed, inter alia, for an injunction restraining the defendant from re-entering their land known as No 301, Batu Ferringhi, Pulau Pinang ('the said premises') and remaining therein, and from assaulting, molesting, annoying or interfering with the plaintiff's enjoyment and possession of the said premises until the disputes between them have been resolved by an arbitrator to be appointed pursuant to cl 4(e) of a tenancy agreement ('the said agreement') entered between them dated 1 July 1987 or until the final determination of this suit. Further or in the alternative, the plaintiff prayed for a declaration that he be entitled to renew the tenancy of the said premises from year to year for five years from the expiry of the present tenancy on 15 July 1988.

On the same date, the plaintiff applied by summons in chambers, made ex parte, for an interim injunction against the defendant for similar orders as stated in the writ. The court, however, granted him a limited order restraining the defendant from interfering with the plaintiff's enjoyment and possession of the said premises until further order. The hearing of prayer 2 of the application (ie that the dispute or differences between the parties to be referred to arbitration under the agreement) was adjourned to a date to be fixed.

The plaintiff's application for an interim injunction was supported by an affidavit of Tan Kean Hin, one of the partners of the plaintiff's firm (encl 3). Mr Tan deposed that the plaintiff formed its partnership on 25 July 1986 to carry on the business of providing horse and pony riding facilities, including riding lessons, for tourists and local residents. It commenced business sometime in December 1986 in Sungai Tiram, Bayan Lepas, Pulau Pinang. Sometime in August 1986, Tan came to know Ms Yong Chiew Imm and later Mr Charles Chow of Rasa Sayang Hotel, Batu Ferringhi. Ms Yong was then the defendant's public relations officer and Mr Chow was the financial controller. Tan discussed with Ms Yong the idea of pony rides for hotel guests of Palm Beach Hotel, Batu Ferringhi on every Sunday to be managed by the defendant. An agreement was concluded between the plaintiff and Palm Beach Hotel which was executed on 19 December 1986. The success they had at the said hotel spurred the plaintiff with the assistance of Ms Yong to introduce similar riding facilities for the guests of Rasa Sayang Hotel. He told Ms Yong that the plaintiff did not have sufficient space around Batu Ferringhi to cater for this type of sport and it would be difficult to transport the horses and ponies daily from Sungai Tiram to Batu Ferringhi. She then suggested that the plaintiff could use a piece of land known as No 301, Batu Ferringhi, Penang which is situated adjoining to the Rasa Sayang Hotel which according to her had been vacant for the past five years. The said premises has an area of approximately 3.5 acres. Tan was then agreeable with this idea and the parties then met Mr Charles Chow to discuss further details. Finally Tan was informed that the defendant had agreed to let out the said premises to the plaintiff to carry on the plaintiff's business. Tan also made known of his plan to renovate and improve the said premises. He stated that the defendant had agreed to contribute $2,000 towards renovation which would be deducted from the rental. This was confirmed by letter from the defendant dated 18 August 1987. Pausing here, I find it distinctly apparent from the photographs exhibited, that the renovation of the said premises was extensive. According to Tan, they included rewiring and repairing the said premises, clearing of vegetation, construction of stables and laying out tracks for the horses and ponies and refencing the entire area. All in all, the total cost of renovation came up to about $49,000.

In the meantime, a draft tenancy agreement was prepared and showed to Tan who was unhappy regarding the period of tenancy. The draft agreement stipulated that the tenancy was for only one year and without any option to renew. Bearing in mind the substantial amount of money to be spent on the renovation, Tan was quite naturally reluctant to commit the plaintiff into signing the said tenancy agreement. He expressed his predicament on behalf of the plaintiff to Mr Chow, who orally represented to him that the draft agreement was a standard agreement and the period of a one-year tenancy was only a formality since the defendant would not require the said premises for the following five years. Tan also alleged that Mr Chow further represented to him that the tenancy would be renewed, as a matter of course. Hence, upon these representations, the plaintiff signed the tenancy agreement on 1 July 1987 and the partners committed themselves to improve the said premises and related facilities based on a five-year projection. The plaintiff estimated that the gross profit per year would be $250,000.

After the commencement of the plaintiff's business at the said premises, everything appeared to have gone on smoothly and well. The plaintiff's relationship with the defendant was good and the business of horse-back riding began to give added attraction for Rasa Sayang Hotel. There was even one occasion when the plaintiff was asked to sponsor pony rides for charity. The only problem then was to obtain the approval of Majlis Perbandaran Pulau Pinang for conversion of land use from residential to business use. It seemed the plaintiff gave the forms to Mr Chow for him to sign on behalf of the defendant. This he failed to do. The relationship between the plaintiff and the defendant suddenly changed when Rasa

Sayang Hotel had a new general manager sometime in November 1987. First, he ordered that the plaintiff's signboard at the entrance of the said premises be pulled down and then directed that the advertisement board in the lobby of the hotel be removed. The plaintiff thereafter began to encounter one problem after another. The defendant's refusal to sign the application form had put the plaintiff under prosecution by the Majlis Perbandaran Pulau Pinang. The plaintiff alleged that on 15 January 1988, the defendant unlawfully entered the said premises and locked up one of the rooms. The plaintiff was also served with a notice to quit terminating the tenancy agreement for a breach of the said agreement. Finally, on 15 July 1988 the defendant through their servants or agents forcibly broke into the premises and attempted to seal off the said premises. Despite the plaintiff's pleas to these men not to do anything to obstruct the plaintiff's right to the said premises, they still attempted to seal the said premises, but was prevented by Tan.

Upon the above grounds, the plaintiff applied for and was granted an interim injunction on 19 July 1988 restraining the defendant by their servants or agents from re-entering the said premises and interfering with the plaintiff's enjoyment and possession until further order.

On 22 July 1988 the defendant filed the two applications seeking to set aside the ex parte injunction and to strike out the writ of summons and indorsement. The defendant relied on an affidavit of Oh Thean Koon, the defendant's senior financial controller. The general tenor of this affidavit is one of denial of Tan's allegations in his supporting affidavit (encl 3). Whilst some of the facts deposed therein are supported by documents, eg police reports lodged by the defendant's employees, the rest of the facts are hearsay. It is trite that a deponent cannot deny something when it is alleged that someone else had made certain statements or representations to the person complaining, unless such statements or representations were made by the maker in the presence of the said deponent. Such was the situation here. Mr Oh merely stated in his affidavit that he had ascertained that there was no such representation made by Mr Charles Chow to Tan regarding the tenancy agreement. At any rate, from Tan's affidavit in reply (encl 16) it was stated that Mr Oh was not in a position to know anything about the alleged representation made by Mr Charles Chow because he was only employed by the defendant on 1 July 1988, several months after the statement was alleged to have been made. Quite surprisingly, I do not have the benefit of reading the affidavit of either Mr Chow or Ms Yong to rebut the allegations of Mr Tan.

On application to strike out the writ and indorsement

After considering the submissions of counsel, I find the defendant's application to strike out the writ of summons and the indorsement to be misconceived. In the first place, there are flaws in the application. It is not disputed that this application was made and filed before the plaintiff had filed the statement of claim. As this is an application for a dismissal of the plaintiff's action, it is a salutary rule that the application should not be made before the service of the statement of claim: see *Wright* v *Prescot UDC*.[1]

Secondly, the defendant's application in encl 7 was made on all the grounds specified in O 18 r 19(1). Yet, there was nothing in the affidavit of Oh stating his reasons why the action should be struck out on grounds (b), (c) and (d) of r 19(1). We are aware that affidavit evidence is ordinarily used in all applications under r 19(1) except when the application is made under para (a) where it is clearly provided under r 19(2) that no evidence is admitted. In the present case, the supporting affidavit of Mr Oh was primarily to support an application to dissolve an ex parte injunction and to rebut all the allegations of Tan in his affidavit. Therefore, in the absence of a supporting affidavit for grounds (b), (c), (d) of r 19, prayers 1(b) and (c) of encl 7 must be deemed to have been abandoned by the defendant. At any rate they should be struck out.

Based on the submission of Mr Sivanandan in his 'points of submission' I form the view that the defendant based their application solely on the indorsement on the writ and on the face of it, it is their case that the writ and the indorsement disclosed no reasonable cause of action. Therefore, on the basis of the indorsement on the writ, can this court order to be struck out the writ and the indorsement on the ground that they disclose no reasonable cause of action? Here, it is common ground that the crucial issue is whether or not there is a reasonable cause of action. Bearing in mind that I have to consider the issue in the absence of a statement of claim, nevertheless, in my opinion, there is a cause of action which is founded on a tenancy agreement dated 1 July 1987. Indeed, in Tan's affidavit there is an allegation of oral representations made by the defendant's servants or agents upon whose assurance the plaintiff acted upon to sign the said tenancy agreement and it is the defendant's case that the plaintiff could not rely on the said tenancy agreement which had since expired. According to the *Supreme Court Practice*, 1985 Ed, p 306, so long as the pleading discloses some cause of action or raises some question to be decided by a judge or jury, the mere fact that the case is weak and not likely to succeed is no ground for striking it out. For the above reasons and in the exercise of my powers under O 18 r 19 I dismiss the defendant's application with costs.

On application to set aside the interim ex parte injunction

Upon considering the 'points of submission' of Mr Sivanandan and the supporting affidavit of Mr Oh, it is clear

to me that the defendant relied on the following grounds to support their application that the ex parte injunction be dissolved. First, on a procedural point, it was contended that the supporting affidavit of Tan (encl 3) was affirmed a day before the writ and the summons in chambers were filed. Counsel submitted that this was fatal to the plaintiff's application. On the authorities, it is clear that affidavits should be sworn after the writ is issued. But, where the affidavit had been sworn before the issue of the writ, an order could be made on the plaintiff's undertaking to have it resworn and filed (*Green* v *Prior*[2]); see 1985 *Supreme Court Practice* O 29/1/16, p 462. In fact, this irregularity can now be rectified by Tan reswearing his affidavit and filing it in court.

Secondly, counsel submitted that there was non disclosure of material facts by the plaintiff which would have affected the granting of the ex parte injunction. The defendant alleged that the plaintiff failed to disclose or at least has misled the court regarding the alleged forced re-entry of the said premises by the defendant's servants or agents. The defendant contended that the re-entry was proper, peaceful and it was made according to law. In this connection, counsel also submitted that the plaintiff could not remain on the said premises after the expiry of the tenancy after it was lawfully terminated and in the light of *Khoo Kongsi's* case,[3] the plaintiff could not rely on ss 7 and 8 of the Specific Relief Act 1950.

Finally, counsel submitted that the plaintiff could not rely on the purported oral representation made by the defendant's agent, Mr Charles Chow regarding a five-year tenancy to be renewed year to year to contradict the express written terms of the said agreement giving the plaintiff only a one-year tenancy without any option to renew.

Upon a proper consideration of the matter, I find there was no suppression of material facts as alleged by the defendant. I accept the affidavit of Tan which clearly explained the whole situation and provided reasons in support of the plaintiff's application. On the whole I find no sufficiently cogent grounds for the present injunction to be discharged. In arriving at this conclusion, I am guided by the principles enunciated by Lord Diplock in *American Cyanamid Co* v *Ethicon Ltd*[4] which established that the court must be satisfied that the plaintiff's claim was not frivolous or vexatious; in other words that there was a serious issue to be tried. In the present case, there is a serious question to be tried regarding the tenancy of the said premises. The plaintiff claimed that as a result of oral representations made by Mr Chow, the plaintiff acted upon them in signing the said tenancy agreement. In essence, this allegation raises an interesting point of law on a collateral contract. Secondly, I find the balance of convenience lay in favour of the interim injunction remaining in force. If the plaintiff were successful there would be difficulty in putting his business, including getting the horses and ponies and other paraphernalia into the said premises again. Moreover, there would be difficulty in quantifying the loss suffered by the plaintiff. In fact, the status quo will be preserved by the continuation of the injunction. On the other hand, there should be no difficulty in quantifying the defendant's loss if they were successful. There was no suggestion that the defendant would require the said premises for their immediate use.

For the above reasons, I disallow the defendant's application with costs and order the injunction to remain until final disposal of the suit. However, in the interest of both parties, I make an order for an early trial of the said suit as soon as the pleadings are closed.

Application dismissed.

Solicitors: *Presgrave & Matthews*; *Tan Beng Hong & Co.*

Reported by *Ng Sheau Jiuan*

Penerbit Fajar Bakti Sdn Bhd v Cahaya Surya Buku dan Alat Tulis

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO C22-40 OF 1986
VC GEORGE J
15 APRIL 1987

Copyright – Collection of short stories and poems – Copyright to – Existence of

Copyright – Anton Piller order – Application for in copyright infringement cases – Successful trap purchase exercise and prima facie evidence of copyright ownership sufficient to justify court granting Anton Piller order

Civil Procedure – Anton Piller order – Application for in copyright infringement cases – Successful trap purchase exercise and prima facie evidence of copyright ownership sufficient to justify court granting Anton Piller order

The plaintiffs had earlier obtained an Anton Piller order against the defendants. In their supporting affidavit, the plaintiffs contended that the defendants had infringed the plaintiffs' copyright in two books by publishing, distributing, exhibiting and selling infringed copies of the two books. The plaintiffs also contended that they had the copyright in the books because the persons who had collected, selected and arranged the short stories in the one and poems in the other of those two books had duly assigned their copyright to the plaintiffs.

The defendants applied to have the Anton Piller order dissolved and sought an order for damages. They submitted that the plaintiffs had no copyright in either of the works and that it was the actual authors of the stories and poems that had the copyright in them.